Custom Coffee Service Corp. *and* Teamsters Local 786, affiliated with International Brotherhood of Teamsters Chauffeurs, Warehousemen and Helpers of America, AFL–CIO. Case 13–CA–33985

December 24, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND FOX

Upon a charge and first amended charge filed by Teamsters Local 786, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, the Union, on January 24 and May 16, 1996, the General Counsel of the National Labor Relations Board issued a complaint on May 30, 1996, against Custom Coffee Service, Inc., the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the National Labor Relations Act. The Respondent filed an answer to the complaint.

Thereafter, the Respondent entered into, and Administrative Law Judge Leonard M. Wagman approved, a settlement agreement on September 18, 1996, containing the following language:

> The [Respondent] agrees that in case of non-compliance with any of the terms of the Settlement Agreement by [the Respondent], including but not limited to, failure to make timely installment payments of monies as set forth above, and after 15 days notice from the Regional Director of the National Labor Relations Board, on motion for summary judgment by the General Counsel, the Answer of the [Respondent] shall be considered withdrawn. Thereupon, the Board shall issue an Order requiring the [Respondent] to Show Cause why said Motion of the General Counsel should not be granted. The Board may then, without necessity for trial, find all allegations of the Complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the [Respondent], on all issues raised by the pleadings. The Board may then issue an Order providing a full remedy for the violations so found as is customary to remedy such violations, including but not limited to the provisions of this Settlement Agreement. The parties further agreed that a Board order and a U.S. Court of Appeals Judgment may be entered hereon ex parte.

As part of the settlement agreement, the Respondent agreed to execute the collective-bargaining agreement between the Respondent and the Union effective by its terms from January 13, 1994, through January 12, 1997, and to abide by such contract, and to make accrued pension and health and welfare contributions on behalf of its unit employees, the first of which was to be made by October 31, 1996. The Respondent further agreed thereafter to pay $4,128.63 by the first of every month, but no later than the 10th of every month, for 12 months until full payment is completed. To date, the Respondent has not executed the collective-bargaining agreement, and no payment has been received from the Respondent.

By letter dated October 25, 1996, the Region notified the Respondent that it was not in compliance with the terms of the settlement agreement and that, pursuant to the terms of the settlement agreement, the Regional Director would file a Motion for Summary Judgment within 15 days.

Thereafter, on November 19, 1996, the General Counsel filed a Motion for Summary Judgment requesting that the Respondent's answer to the complaint be considered withdrawn pursuant to the terms of the settlement agreement and that the allegations in the complaint be deemed as true. On November 21, 1996, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On December 5, 1996, the Union filed a statement in support of the General Counsel's motion. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Further, the undisputed allegations in the Motion for Summary Judgment disclose that although the Respondent initially filed an answer to the complaint, it subsequently entered into a settlement agreement which provided for the withdrawal of the answer in the event of noncompliance with the settlement agreement, and such noncompliance has occurred. Accordingly, we find that the Respondent's answer has been withdrawn by the terms of the September 18, 1996 settlement agreement, and that, as further provided in that settlement agreement, all the allegations of the complaint are true.[1]

[1] *U-Bee, Ltd.*, 315 NLRB 667 (1994).

Accordingly, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, an Illinois corporation with an office and place of business in Chicago, Illinois, has been a vending and food service operator. During the 12-month period ending March 31, 1996, the Respondent, in conducting its business operations, provided services valued in excess of $50,000 for other enterprises within the State of Illinois, which are in turn directly engaged in interstate commerce. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> Full time and regular part time truck drivers, servicepersons, installation men, shop workers, mechanics, repairmen, shipping and receiving employees, vending hosts/hostesses, vending food handlers, sanitation workers, stampers and their helpers, employed by the Respondent at its facility presently located at 5708 S. Central Avenue, Chicago, Illinois; but excluding guards and supervisors as defined in the Act.

Since about 1970 and at all material times until about September 30, 1995, the Chicago Cigar, Tobacco, Cigarette Salesmen, Drivers, Helpers and Inside Workers and Vending Machine Drivers, Servicemen Vending Host/Hostesses and Inside Workers, Local Union No. 761 affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & helpers of America (Local Union No. 761), had been the designated exclusive collective-bargaining representative of the unit and had been recognized as such representative by the Respondent. This recognition had been embodied in successive collective-bargaining agreements, the most recent of which was in effect from October 1, 1986, until September 30, 1989, and was thereafter extended.

About September 30, 1995, Local Union No. 761 merged with the Union, and the Union has thereafter been recognized by the Respondent as the collective-bargaining representative of its employees. At all material times, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

About January 13, 1994, the Respondent and Local Union No. 761 agreed to terms for a new collective-bargaining agreement with respect to terms and conditions of employment of the unit. Since January 22, 1996, the Union has requested that the Respondent execute a written contract containing this agreement, and since that date, the Respondent has failed and refused to execute the agreement.

Since about December 1995, the Respondent failed to continue in effect all the terms and conditions of the collective-bargaining agreement agreed to about January 13, 1994, by failing and refusing to make the appropriate accrued sick leave payments to unit employees as required by the collective-bargaining agreement. Since about October 1995, the Respondent failed to continue in effect all the terms and conditions of this collective-bargaining agreement by failing and refusing to make the accrued pension, health and welfare contributions of unit employees as required by the collective-bargaining agreement. The Respondent engaged in this conduct without the Union's consent. These terms and conditions of employment are mandatory subjects for the purposes of collective bargaining.

CONCLUSIONS OF LAW

By the acts and conduct described above, the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has failed and refused to execute the collective-bargaining agreement agreed to about January 13, 1994, we shall order it to execute the agreement, give it retroactive effect, and make the unit employees whole for any losses attributable to the Respondent's failure to execute the agreement. Backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Furthermore, having found that the Respondent has violated Section 8(a)(5) and (1) by failing to make contractually required accrued sick leave payments to unit employees since about December 1995, we shall

order the Respondent to make the employees whole for its failure to do so. Backpay shall be computed in accordance with *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra.

In addition, having found that the Respondent has also violated Section 8(a)(5) and (1) by failing to make the appropriate accrued pension, health and welfare contributions of unit employees since about October 1995, we shall order the Respondent to make whole its unit employees by making all such delinquent contributions, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). In addition, the Respondent shall reimburse unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra.[2]

ORDER

The National Labor Relations Board orders that the Respondent, Custom Coffee Corp., Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing or refusing to execute the collective-bargaining agreement reached on January 13, 1994, for the following unit:

> Full time and regular part time truck drivers, servicepersons, installation men, shop workers, mechanics, repairmen, shipping and receiving employees, vending hosts/hostesses, vending food handlers, sanitation workers, stampers and their helpers, employed by the Respondent at its facility presently located at 5708 S. Central Avenue, Chicago, Illinois; but excluding guards and supervisors as defined in the Act.

(b) Failing to continue in effect all the terms and conditions of the collective-bargaining agreement reached on January 13, 1994, by failing and refusing to make the contractually required accrued sick leave payments to unit employees or the accrued pension, health and welfare contributions of unit employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Execute the collective-bargaining agreement reached about January 13, 1994, and give it retroactive effect.

(b) Make the unit employees whole, with interest, for any losses attributable to the Respondent's failure to execute the collective-bargaining agreement or to comply with its terms, including its failure to make contractually required accrued sick leave payments to unit employees since about December 1995, and its failure to make contractually required pension, health and welfare contributions of unit employees since about October 1995, in the manner set forth in the remedy section of this decision.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Chicago, Illinois, copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 24, 1996.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region

[2] To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the Respondent's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 24, 1996

William B. Gould IV,	Chairman
Margaret A. Browning,	Member
Sarah M. Fox,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail or refuse to execute the collective-bargaining agreement reached on January 13, 1994, for the following unit:

> Full time and regular part time truck drivers, servicepersons, installation men, shop workers, mechanics, repairmen, shipping and receiving employees, vending hosts/hostesses, vending food handlers, sanitation workers, stampers and their helpers, employed by us at our facility presently located at 5708 S. Central Avenue, Chicago, Illinois; but excluding guards and supervisors as defined in the Act.

WE WILL NOT fail to continue in effect all the terms and conditions of the collective-bargaining agreement reached on January 13, 1994, by failing or refusing to make the contractually required accrued sick leave payments to unit employees or the accrued pension, health and welfare contributions of unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL execute the collective-bargaining agreement reached about January 13, 1994, and give it retroactive effect.

WE WILL make the unit employees whole, with interest, for any losses attributable to our failure to execute the collective-bargaining agreement or to comply with its terms, including our failure to make contractually required accrued sick leave payments to unit employees since about December 1995, and our failure to make contractually required pension, health and welfare contributions of unit employees since about October 1995.

CUSTOM COFFEE CORP.